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No. 90-1412

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF ALABAMA HIGHWAY DEPARTMENT,
Petitioner,

vs.

SHIRLEY ANN BOONE, as Administratrix of the Estate of VERNON DALE BOONE, JR.; SHIRLEY ANN BOONE, individually; SHIRLEY ANN BOONE on behalf of KELLEY LEE BOONE, the minor child and dependent of VERNON DALE BOONE, JR.; SOUTHERN RAILWAY COMPANY; THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY; NORFOLK SOUTHERN CORPORATION; and CITY OF LEEDS, ALABAMA,
Respondents.

Petition For A Writ of Certiorari To The Supreme Court of Alabama

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent Shirley Ann Boone respectfully requests that the Court deny the Petition for a Writ of Certiorari to review the decision of the Supreme Court of Alabama rendered on September 21, 1990.

STATEMENT OF JURISDICTION

This Honorable Court should not exercise jurisdiction in this case because Petitioner has not propounded an important question of federal law which should be settled by this Court, nor has Petitioner presented to the Court a federal question that conflicts with the decision of another state court of last resort or which has been decided in a way that conflicts with applicable decisions of this Court. Sup. Ct. R. 10.1.

STATEMENT OF THE CASE

Respondent agrees with the recitation of pertinent events which are set forth in Petitioner's statement of the case, but objects to all argument contained therein.

REASONS FOR DENYING PETITION

There is no special or important reason for this Court to entertain this petition for writ of certiorari: *Every* published opinion which has addressed this issue is in accord with the holding by the Alabama Supreme Court. The Alabama Supreme Court has decided a federal question, but not in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals, nor conflicts with applicable decisions of this Court. Sup. Ct. R. 10.1(b). The plain meaning of 23 U.S.C. § 409, its legislative history, and judicial construction given a similar statute obviate that the Alabama Supreme Court correctly held that documents compiled pursuant to 23 U.S.C. § 409 are discoverable.

I. The Plain Meaning of the Language Contained in 23 U.S.C. § 409 Does Not Obviate a Congressional Intent to Bar the Discoverability of the Documents Referred to in the Statute.

The starting point for interpreting a statute is the language of the statute itself, and absent a clearly expressed legislative intent to the contrary, the language is conclusive. *Birmingham Trust Nat. Bank v. Case*, 755 F.2d 1474 (11th Cir. 1985). Section 409 expressly bars the admissibility of certain documents, and to this extent, federal law attempts to preempt the Alabama law of evidence. However, it is certainly not clear that Section 409 preempts Ala. R. Civ. P. 26 regarding the discoverability of such materials. Before Congress can intrude upon an area traditionally occupied by the states, its intent to preempt must be clear. *Jones v. Rath Packing Co.*, 430 U. S. 519 (1977). Certainly, "[a] state's regulation of its court system is ... as fundamental a function of its sovereignty as the normal exercise of its police power even in matters concerning the health and safety of its citizens." *Martinolich v. Southern Pacific Transportation Co.*, 532 So.2d 435, 438 (La.App. 1988), *cert. den.*, __ U.S. __, 109

S.Ct. 3164 (1989). Thus, Section 409 must be construed restrictively so that Congress may intrude only so much as it has expressly prescribed. *See Martinolich, supra* at 438.

The phrase, "considered for other purposes," cannot be construed as barring the discoverability of the specified documents because the term "consider" does not accurately describe what parties do in conducting discovery. "Consider" is defined as follows: "1. to think about seriously; 2. To regard as: deem; 3.To judge: believe." Webster's II New Riverside Dictionary 152 (1984). Furthermore, under a familiar rule of statutory construction known as "noscitur a sociis," the intent of a specific word may become clear by reference to the other words associated with it in a statute. *United States v. LaBrecque*, 419 F.Supp. 430 (D.C.N.J. 1976). Obviously, the term "considered for other purposes" read in context with "shall not be admitted into evidence in Federal or State Court or ...," refers to a trier of fact's consideration of the enumerated documents. Section 409 plainly prevents a trier-of-fact from "considering" the specified documents during a trial; the term suggests that a trial court may not allow opinions expressed in such documents to be conveyed to the trier-of-fact in such a way that such trier-of-fact "thinks about seriously" or "judges" such information.

II. The Legislative History of 23 U.S.C. § 409 Reveals No Congressional Intent to Bar the Discovery of Documents Referred to in the Statute.

In order to overcome intent expressed in the plain meaning of a statute, a contrary legislative intent must be clear and convincing. *In re The Bible Speaks*, 69 B.R. 368 (Bankr. D. Mass. 1987). Yet, the legislative history of 23 U.S.C. § 409 indicates that Congress did not intend to bar the discovery of the specified reports, surveys, data, schedules and lists. On April 25, 1984, a bill was introduced in the U. S. House of Representatives which contained the following:

SEC. 118 USE OF CERTAIN REPORTS AS EVIDENCE

> Notwithstanding any other provision of law, no report, list, schedule or survey prepared by or for a State pursuant to section 152 of title 23, United States Code, or section 203 of the Highway Safety Act of 1973 shall be admitted as evidence or used in any suit or action for damages arising out of any matter mentioned in such report, list, schedule, or survey.

H.R. 5504, 98th Cong., 2d Session (1984). The House Report on the bill stated as follows:

> *Section 118 - Use of Certain Reports as Evidence*
>
> Section 118 prohibits the introducing into evidence of any priority listing of roadside or rail-highway crossing hazards prepared pursuant to section 152 of title 23, U.S. Code (hazard elimination), and section 203 of the Highway Safety Act of 1978 (Rail-Highway Crossings). This is to encourage greater accuracy and completeness in the compilation of such lists, by preventing these lists from being used in any judicial proceeding, thereby improving their quality as a basis for programming.

H.R. Rep. No. 98-768, 98th Cong., 2d Session (1984). No mention is made of barring the discovery of such materials. This bill did not become law.

The House Conference Report on Section 409 briefly summarizes Section 409 and is entitled, "Use of Reports as Evidence." H.R. Rep. No. 100-28, 100th Cong., lst Sess., *reprinted in* 1987 U.S. CODE CONG. & AD. NEWS 156. And the title given Section 409 in the United States Code is "Admission as evidence of certain reports and surveys."

In its brief, Petitioner often refers to policies behind the adoption of Section 409 which necessitate the barring of certain

documents from discovery. Yet Petitioner's citation of sources is extremely lacking. Only one cited source actually states that documents compiled pursuant to Section 409 should not be disclosed and this source is an internal memorandum written by an official of the United States Department of Transportation, Marshall Jacks. Brief of Petitioner, A-57. This self-serving memorandum represents merely Mr. Jack's personal view and not that of Congress, and as such, the memorandum is entitled to no weight in determining Congressional intent. *See Sutherland v. Egger*, 865 F.2d 56 (3rd Cir. 1989).

III. Every Published Decision which Has Considered this Issue Has Held that Documents Compiled Pursuant to Section 409 are Discoverable.

The Alabama Supreme Court's decision is in accord with every published decision which has considered this issue: *Hagerty v. Southern Ry. Co.*, 133 F.R.D. 34 (E.D. Mo. 1990); *Indiana Dept. of Transportation v. Overton*, 555 N.E.2d 510 (Ind.App. 1990); *Martinolich v. Southern Pacific Transportation Co.*, 532 So.2d 435 (La.App. 1988), *writ denied*, 535 So.2d 745 (La. 1989), *cert. denied*, _ U.S. _, 109 S.Ct. 3164 (1989); *Light v. State of New York*, 560 N.Y.S.2d 962 (N.Y. Ct.Cl. 1990).

Additionally, other courts which have considered Section 409 apparently assumed that documents compiled pursuant to the statute are discoverable. *See Taylor v. St. Louis Southwestern Ry.*, 746 F.Supp. 50 (D. Kan. 1990); *Hickey v. Union Pacific R.R.*, 104 Or. App. 724, 803 P.2d 275 (1990); *Duncan v. Union Pacific R.R.*, 790 P.2d 595 (Utah App. 1990).

IV. An Analogous Statute to Section 409, 49 U.S.C. app. 1441(e)(1982), has been Construed to Allow Discovery and to Allow Admissibility Into Evidence in Certain Circumstances.

49 U.S.C. app. 1441(e)(1982) states as follows:

> No part of any report or reports of the National Transportation Safety Board relating to any accident or the investigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports.

Most courts which have construed this statute have held that reports of the National Transportation Safety Board are not only discoverable, but are also admissible if such documents do not reflect any conclusions as to a probable cause of an accident. *See, e.g., Mullan v. Quickie Aircraft Corp.*, 797 F.2d 845 (10th Cir. 1986); *Travelers Ins. Co. v. Riggs*, 671 F.2d 810 (4th Cir. 1982); *Berguido v. Eastern Airlines Inc.*, 317 F.2d 628 (3rd Cir.), *cert. denied*, 375 U.S. 895 (1963); *In re Air Crash Disaster at Stapleton Int'l*, 720 F.Supp. 1493 (D. Colo. 1989). Most courts have generally agreed that

> the purpose of the statute was to bar admission of conclusions or opinions more properly left to a jury rather than to establish a privilege encouraging full disclosure to the investigating agency. *Citation omitted.* The legislative history of the statute demonstrates its purpose was to prevent usurpation of the jury's role by evidentiary use of the Board's conclusions as to probable cause. This purpose is served by the exclusion of conclusions regarding the probable cause of an accident ....

In re Air Crash Disaster at Stapleton Int'l, supra at 1496.

These National Transportation Safety Board reports deal with specific accidents. Their discoverability and admissibility

strengthens the argument for the discoverability of documents compiled pursuant to Section 409, since the documents compiled pursuant to Section 409 deal only with the characteristics of the railroad crossing or other highway locations, and not to the accident at issue. A reasonable construction of Section 409 allows not only the discovery of such documents, but also allows their admissibility when such admission will not usurp the jury's role in determining an accident's proximate cause.

Petitioner's assertion that allowing discovery of Section 409 documents will "chill honest and robust analysis" is misplaced. Allowing pertinent, reliable information to be concealed under the guise of promoting a more accurate reporting of potentially hazardous highway locations is unacceptable. This suppression of information greatly prejudices a claimant's chances to fully determine and present all facts relevant to his claim.

CONCLUSION

The petition for writ of certiorari should be denied. Petitioner simply does not raise a federal question appropriate for review by this Court.

Respectfully submitted,

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